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Supreme Court of the United States

October Term, 1976

No. 76-855

LEGGETT & PLATT, Inc.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner Leggett & Platt, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on September 29, 1976.

OPINIONS BELOW

The opinion of the court of appeals is unofficially reported at 1976-2 Trade Cas. ¶ 61,124 and appears herein as Appendix A, at pages 2a-9a. The opinion of the district court is unofficially reported at 1975-1 Trade Cas. ¶ 60,220 and 19 F.R.Serv.2d 1370, and appears herein as Appendix B, at pages 10a-19a. The modifying order is unofficially reported at 1975-1 Trade Cas. ¶ 60,269, and appears herein as Exhibit C, at page 20a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 29, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Under *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, didn't the Government's bald refusal to produce over 1,000 pages of documents, concerning which it did not raise any or any proper objection on appeal, sufficiently support the district court's order to dismiss the complaint without prejudice for failure to comply with the court's order to produce?

(2) In view of *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, isn't it improper for a court of appeals to substitute its judgment for the discretionary decision of the district court as to the production of documents since the district court reviewed the documents *in camera* and the court of appeals did not?

(3) Since the district court reviewed the documents, *in camera*, and fully considered the evidence and arguments as to the production of the documents before ordering the documents to be produced, isn't it improper for a court of appeals to reverse and order the district court to re-review the documents and make specific document by document findings of such matters as relevance, defendant's need, the availability of the information elsewhere, and other matters, particularly where the Government refused to make the documents available to defendant for analysis of these very issues?

(4) Doesn't the Sixth Circuit's over-broad interpretation of the work product doctrine unduly prevent discovery of relevant information in the hands of the Government?

STATUTORY PROVISION INVOLVED

No statutes are involved. Rules 26(b)(3), 37(a)(2), 37(b)(2)(C) and 52(a) of the Federal Rules of Civil Procedure are set out in Appendix D, at pages 21a-23a.

STATEMENT OF THE CASE

History of the Lawsuit

On May 18, 1971 the United States Department of Justice ("Government") filed this civil antitrust action against Leggett & Platt, Inc. ("LP") alleging that LP's January, 1968 acquisition of Motor City Spring Company and its March, 1969 acquisition of J. R. Greeno Company violated Section 7 of the Clayton Act (15 U.S.C. § 18). For the preparation of its defenses, LP sought to obtain documents from Government investigations of other acquisitions relating to the structure of the relevant industry, which the Government refused to produce.

After examining over 7,000 documents *in camera* and considering and re-considering the argument of both sides as to the Government's many claims of privilege, the district court ordered production. (Pages 10a-11a). When the Government still refused to produce approximately eight inches of documents (Pages 24a-25a), the court dismissed the case under Fed. R. Civ. P. 37(b)(2)(C). (Page 19a). The dismissal was *without prejudice*. (Page 20a). The Government then appealed from the district court's ruling as to only part of the documents it had refused to produce. On September 29, 1976 the Court of Appeals for the Sixth Circuit vacated the dismissal and remanded the case.

The Discovery Requests

The Government's principal charge was that LP and the two acquired companies manufactured and sold inner-

springs and boxsprings for the bedding industry, which comprised lines of commerce adversely affected by the acquisitions in geographic markets east of the Rockies and particularly in Michigan and Ohio. The accuracy of these geographic and product market definitions were among the principal issues in the case.

On August 9, 1971, LP served interrogatories to identify the Government's market studies, investigations, reports, etc. concerning these markets. Although the Government answered these interrogatories and agreed to update its answers, it did not disclose that since the initial LP acquisition in question it had already investigated at least two other acquisitions in the same industry or that it subsequently investigated at least two more. By late 1974, LP learned of some of the Government's undisclosed investigations through depositions of third parties.

These Government investigations of other acquisitions in the industry dealt with many of the same issues as were involved in the instant case, such as the geographic and product market, the existence and effect of substitute products, the ease of entry into the market, trends towards concentration in the industry, the market share of the industry, and related matters. In general, a great mass of statistical information and opinions was developed in these investigations from industry sources as to competitive conditions and the market position of the manufacturers. In addition, the depositions developed that there were serious discrepancies between some of the market figures cited in the depositions in the instant case and the information previously reported to the Government in the other investigations.

Meanwhile, the case was set for trial in March, 1975 and LP met with hostility and lack of cooperation in its own efforts to obtain market information from these sources. The Government refused to update its discovery responses and told LP that under no circumstances would it

produce *any* documents from the undisclosed investigations. (Page 24a). LP thereupon served a formal Request to Produce. The Government refused to comply and countered with a motion for a protective order, claiming lack of relevance, undue burden, confidential business information, prosecutorial discretion and attorney work product, and further argued that it should not be required to produce the documents since they were inconveniently located and the Government did not intend to use them. LP refuted the Government's claims and asserted its need for the information and inability to obtain it elsewhere.

The District Court's Consideration of the Documents

The parties submitted affidavits, deposition testimony and extensive briefs to the court. LP repeatedly demonstrated the relevancy of the documents, its need for them and its inability to obtain them elsewhere. To the extent that LP had knowledge of specific documents, it related its proof to these documents, including proof that the Government had documents in its files showing deliberate fabrication by one of the Government witnesses. The court held a number of conferences and hearings on this matter at which the parties' respective contentions were repeatedly aired. The district court narrowed LP's Requests three different times. It ordered the Government to identify the relevant Justice Department Antitrust Division investigations of the industry, then noted their probable relevance and ordered the Government to show cause why the requested documents should not be discoverable, and finally ordered the Government to produce for *in camera* inspection documents which it had resisted producing.

During the month of January, 1975, the court painstakingly examined, analyzed and numbered each of approximately 7,000 documents which the Government submitted to it under claims of "confidential business information," work product or both. True to its word, the

Government claimed some form of privilege as to *every* document. However, it did not identify the specific nature of the documents or their authors to LP. Following its review, the court returned the Government's documents and, on February 3, 1975, ordered production within five days of those documents claimed to be "confidential business information" and those claimed to be work product from *closed* investigations.

The Government informed LP's counsel that, despite the district court's order, it refused to produce an eight-inch stack of documents estimated to be approximately 20% of the total (1,400 pages). (Pages 24a-25a). Having "thoroughly re-examined" the documents, the Government moved for reconsideration, re-submitting only 38 of the original 7,000 pages of documents to the court. For the first time, it claimed "governmental privilege" as to these 38 pages. LP's position remained that its need for the documents and its inability to otherwise obtain the information sought were sufficient to overcome the Government's claims of privilege (which LP also disputed).

The District Court's Dismissal

Despite an impending trial date, the court considered the Government's new arguments and re-reviewed documents *in camera*. On March 6, 1975, it issued an opinion denying the Government's Motion for Reconsideration. After noting that the "governmental privilege" claimed was not a statutory or constitutional privilege and did not involve state or military secrets or the identity of informers, the court applied "the traditional weighing and balancing of interests," considering "the government's interest in preserving the privacy of its internal consultative and deliberative processes" against the policy of bring to light "all of the relevant evidence." (Pages 17a-18a). With respect to the work product claims, the court also stated that "when

an investigation is closed a work product privilege terminates." (Page 12a).

When the Government still refused to produce approximately 1,400 pages of documents (Page 25a), the court dismissed the case *without* prejudice. At the time of the dismissal, the scheduled trial was barely two weeks away.

The Government's Appeal as to Some of the Documents

After the dismissal, the Government again re-examined the documents it had refused to produce and determined that its claims of privilege as to some of them were "marginal". It then appealed to the Court of Appeals for the Sixth Circuit the district court's ruling as to only 364 of the approximately 1,400 pages of documents it had refused to produce. For the first time, the Government produced an index of the documents.

The Vacating of the Dismissal Order

Apparently without looking at the documents, the Sixth Circuit vacated the district court's dismissal and remanded the case. Among other things, it ordered the district court to do the following:

(1) Make "explicit" findings of relevance as to the documents. (Pages 3a, 9a).
(2) Extend the protection of Fed. R. Civ. P. 26(b)(3) to work product documents generated in closed investigations. (Pages 7a-9a).
(3) Permit discovery of relevant materials otherwise covered by work product or governmental privilege as to which LP's "objective" need outweighs the Government's qualified interest in secrecy. (Page 5a).

In order to conclude, as it did, that the district court had abused its discretion in dismissing the complaint, the Sixth Circuit had to take the following steps:

(1) It ignored the entire three-year history of the proceedings and the fact that the district court had inspected the documents once, and in some cases twice, *in camera*. The Sixth Circuit based its decision entirely on the district court's opinion of March 6, 1975, which by its terms addressed itself to the issue of governmental privilege. (Page 12a).

(2) It ignored the fact that the Government refused to produce approximately 1,000 pages of documents as to which the Government never appealed.

(3) It ignored the fact that as to some of the documents concerning which the Government did appeal, the Government asserted no ground of privilege, but only that the documents were irrelevant—not a basis for failure to produce documents under the Federal Rules.

(4) It ignored the fact that the Government's only objection on appeal as to approximately 115 pages of documents was never even raised before the district court.

In reversing, the Sixth Circuit basically dealt with 364 pages of documents—about one-fourth of those withheld by the Government. As to those, the Court overrode the district court's discretion on the following matters:

(1) The Sixth Circuit's statement that the district court "failed to explicitly determine the relevancy of the requested documents" ignores the fact that the district court not only had examined the documents *in camera*,[1] but had extensively considered the relevancy of the documents as well as the relevancy of the various investigations and the acquisitions, the products and the geographical markets they involved.[2]

[1] Such *in camera* examination provides "the short answer to the relevancy argument." Olson Rug Co. v. NLRB, 291 F.2d 655, 660 (7th Cir. 1961).

[2] All of the other investigations involved the same industry, the same products and the same geographical market. In addition, one of them involved an acquisition in the same state during the same year as one of the LP acquisitions charged to be illegal and involved documents specifically referring to LP.

Extensive deposition testimony, affidavits, briefs and oral argument had been presented to the district court as a basis for its consideration of the documents. The Sixth Circuit's position further overlooks the fact that Rule 52(a) does not require specific findings of fact in this instance.

(2) In the district court, the Government belatedly asserted a qualified governmental privilege as to only 38 pages of the documents.[3] The Sixth Circuit found that the district court "propertly [sic] applied a balancing test in determining whether LP could pierce the qualified governmental official information privilege" but seized upon a single word—"deem"—to conclude erroneously that the district court had considered LP's "subjective" need for the documents rather than its "objective" need. Again, the court of appeals failed to recognize that, after dealing with the documents for three months, the district court knew the issues in the case, the arguments of the parties and, most significantly, the content of the documents—having examined each of them at least once.

In addition, the Sixth Circuit's own Opinion recognizes the consensus of the case authority that, ordinarily, the government should not be permitted to withhold the contents of closed investigations.[4] On this basis alone, the

[3] While the Government claimed that there were other documents subject to this privilege which it would submit if the Court desired, there is no record that the Government did submit any additional documents nor is there anything in the record which identifies the other documents to which the Government referred. This is insufficient identification to assert a claim of privilege. Westinghouse Elec. Corp. v. City of Burlington, Vt., 351 F.2d 762, 770 (D.C. Cir. 1965).

Governmental privilege was asserted on February 7, 1975, almost two months after formal proceedings had been conducted as to the production of the documents. It was plainly an afterthought. If the Government felt it had a strong case on this "recognized rule," it would have asserted it in the first instance.

[4] The Sixth Circuit cited Wood v. Breier, 54 F.R.D. 7, 10 n. 18 (E.D. Wisc. 1972), which catalogues numerous other cases to this effect (Page 6a).

Sixth Circuit seems to recognize that the district court was correct in ordering production.[5]

(3) In the Sixth Circuit, the Government asserted work product only as to about one-sixth of the documents it finally withheld.[6] Although the Sixth Circuit's Opinion apparently requires that the district court individually determine whether a given document was prepared in anticipation of litigation, the Government made no such showing in the district court as to any document.[7] It did not even claim privilege by its administrative officer as required by law.[8] Instead, the Government simply presumed that all of its investigatory files were "in anticipation of litigation" even though the investigations were closed without ever leading to litigtaion (with one exception). The court of appeals could and should have affirmed the denial of the work product claims on this basis alone.[9]

The Sixth Circuit's Opinion admits that a division of authority exists as to the application of the work product

[5] If the decision of the district court were correct on any basis, it should be affirmed. Jaffee v. Dunham, 352 U.S. 280 (1957); Olympic Fastening Systems, Inc. v. Textron Inc., 504 F.2d 609 (6th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

[6] In the Sixth Circuit, the Government asserted work product as to approximately 240 of the approximately 1400 pages of documents it withheld.

[7] Unsupported claims of "work product" are inadequate to invoke the limited immunity of the work product doctrine, for the party resisting discovery bears the burden of establishing that the work product doctrine does apply. Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 61 F.R.D. 653, 658 (D.P.R. 1974); Schenectady Chem., Inc. v. General Elec. Co., 19 F.R.Serv.2d 1132, 1133 (N.D. N.Y. 1975); Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974). In United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973), the work product protection did not apply where the defendant failed to meet this burden.

[8] *E.g.*, Carr v. Monroe Manufacturing Co., 431 F.2d 384, 387 (5th Cir.), *cert. denied*, 400 U.S. 1000 (1970); Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138 (E.D. Wis. 1972); Hodgson v. General Motors Acceptance Corp., 54 F.R.D. 445, 446 (S.D. Fla. 1972).

[9] *See* note 5, *supra*.

doctrine to closed cases, and that no definitive rule existed in the Sixth Circuit. (Page 7a). In fact, this division of authority is, at least in part, a product of the Government's simultaneous efforts to establish different rules in different circuits, depending on whether its documents or those of its adversary are in question.[10] Under these circumstances, the district court has a discretion to apply either of the acceptable, established rules of law which it feels most applicable.[11] It is submitted that by applying to the Government the rule it had established elsewhere, the district court did not abuse this discretion.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Sixth Circuit's Failure to Consider the Entire Record Conflicts with a Decision of This Court and Seriously Undermines the Use of Rule 37.

The record demonstrates that the Government refused to produce a vast number of documents as to which it raised no question on appeal.[12] As to many of those on

[10] *Compare* the Government's position in the instant case *with* that in United States v. International Business Mach. Corp., 21 F.R.Serv.2d 1126 (S.D.N.Y. 1976), and United States v. International Business Mach. Corp., 66 F.R.D. 154 (S.D.N.Y. 1974)

[11] If the application of a privilege is not settled law, the district court's determination of the application of the privilege should not be reversed in the absence of a clear showing of abuse of discretion. *See*, Fears v. Burris Mfg. Co., 436 F.2d 1357, 1362 (5th Cir. 1971).

The Government argued this very proposition in its lawsuit against IBM, and was ultimately successful in sustaining its position in the Second Circuit. (Pages 26a-28a). On July 19, 1976, the Second Circuit denied IBM's petition (No. 76-3035) for a writ of mandamus vacating the order in United States v. International Business Mach. Corp., 21 F.R.Serv.2d 1126 (S.D.N.Y. 1976).

[12] After the dismissal, the Government filed a document in the district court in which it admitted that the number of documents for the appeal was less than the number which it had refused to produce. The record indicates that this amounted to about 1,000 pages out of 1,400 pages.

which it did appeal, the appeal was improper since the only issue as to the document was not raised below.[13] At least 80% of the documents withheld fell within one of these two categories, and no reviewable issue even existed as to them. The court of appeals should have affirmed the district court's decision because of the failure of the Government to produce these documents.

Sub silentio, the Sixth Circuit has adopted a rule that if the Government's position is correct as to any single document, the district court's dismissal based on the Government's refusal to produce a mass of documents will be reversed—even though the dismissal is without prejudice. This procedure would render meaningless the sanctions of Fed.R.Civ.P. 37 and is clearly at variance with this Court's injunction in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*[14] that the entire record in the court below should be considered.

The effect of the decision is far-reaching. It would permit a party, such as the Government in this case, to innundate a district court with documents to review on the chance that, if ordered to produce them, it can refuse and avoid the sanctions of Fed.R.Civ.P. 37 if its position is correct as to any single document. If permitted to stand, this decision will encourage abuses of the discovery process and greatly increase the burden on the federal court system.

2. The Sixth Circuit's Refusal to Accept Decisions of the District Court on Discretionary Matters Unduly Interferes with the District Court's Ability to Control Its Docket, with the Expeditious Administration of Justice, and with the Use of In Camera Proceedings.

National Hockey League v. *Metropolitan Hockey Club,*

[13] Approximately 115 pages, or about one-third of the 364 pages of documents on appeal, fall within this category.

[14] 44 U.S.L.W. 3754 (U.S. June 30, 1976).

Inc.[15] teaches that (a) the district court is required to consider the full record in determining whether to dismiss for failure to comply with the discovery order; and (b) the court of appeals should review the district court's decision to determine whether there has been an abuse of discretion and not to determine what it would have done if the matter had been presented to it as an original matter. In the instant case, the Sixth Circuit not only did not consider the entire record before the district court, but substituted its judgment for that of the district court on a number of discretionary matters. There is no indication in the Opinion that the Sixth Circuit reviewed any of the documents. It dealt almost solely with the district court's Opinion of March 6, 1975, which, by its terms, was addressed to the Motion for Reconsideration involving the governmental privilege issue.

The court of appeals failed to consider the fact that the district court considered the issues over a three-month period, had three hearings or conferences on the matter, issued at least five orders in reference to the documents, and personally inspected the documents, *in camera*, at least once and, in some cases, twice. It failed to consider that the Government was in default for a period of over three years. The Sixth Circuit took an individual word from the district court's Opinion[16] and from that word concluded that the district court had dealt with LP's need for the documents on a subjective basis rather than on an objective basis.

[15] *Id.*

[16] The court of appeals admitted that the district court "properly [sic] applied a balancing test" but faulted the court for "finding that LP's subjective need, its 'deem[ing]' the documents 'essential,' overrode the government interest in secrecy." (Pages 4a-5a).' Obviously the district court would not have had to review the documents to find only subjective need. By the same token, LP was not even told what the documents were. Any fair reading of the record demonstrates that the district court found "objective" need.

The same analysis applies to the circuit court's Opinion as to the relevancy of the documents. It has ordered the district court to re-review the documents to make "explicit" determinations of relevancy.[17] Again, it ignores the months of consideration of the documents and the personal examination of the documents by the district court. It ignores the court's early finding of probable relevance and its "explicit" concern for discovery of "all the relevant evidence." (Page 18a). In substance, the court of appeals was simply unwilling to accept the fact that the district court found the documents relevant and that LP needed them.[18]

This inhospitable attitude seriously undercuts the use of *in camera* proceedings and increases the burden on the districts courts in their use. At best, an *in camera* review imposes a difficult burden on a district judge. He must read and analyze the documents, relate them to the issues

[17] The Sixth Circuit's reversal as to the issue of relevancy is erroneous also because the Sixth Circuit, from its Opinion, applies the wrong standard itself. Under Rule 26(b)(1) covering relevancy in discovery, it is provided as follows:

> "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The rule makes discovery proper "where there is *any possibility* that the information sought may be relevant to the subject matter of the action." United States v. International Business Mach. Corp., 66 F.R.D. 215, 218 (S.D.N.Y. 1974); Bass v. Gulf Oil Corp., 304 F. Supp. 1041, 1045 (S.D. Miss. 1969). *Accord*, 8 Wright and Miller, Federal Practice and Procedure (Civil): § 2008 at 47.

[18] As in Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 136 (E.D. Wisc. 1972), the Government "may be considered repositories of expertise in these matters. They have specifically gathered evidence and analyzed it in order to arrive at their present positions. . . . I believe that the evidence collected and the expertise of staff personnel which is ascertainable through memoranda is relevant for discovery purposes and would aid the [discovering party] in preparing its case. . . ." As the court recognized in Olson Rug Co. v. NLRB, 291 F.2d 655, 660 (7th Cir. 1961), *in camera* inspection of documents is the simplest way to resolve the Government's broad claims that the documents are irrelevant.

in the case, and make the other determinations necessary to ascertain if the privilege applies. A litigant who has not seen the documents can be of only limited help in assisting the court to focus on the issues as to any single document.[19] The problems are greatly compounded when a great number of documents are submitted *in camera* and the producing party makes many and varied objections—as happened in this case. Historically appellate courts have recognized these problems and given due deference to the district court's decision.[20] This is the only case we have found in which an appellate court which did not review the documents reversed a district court that did. If left standing, this decision will substantially interfere with the district courts' ability to control their dockets and to speedily administer justice.

3. The Sixth Circuit's Overly Strict Requirement of Proof for Production Makes It Virtually Impossible to Obtain Government Antitrust Documents Vital to the Defense of Government Suits.

By the Sixth Circuit's imposition of strict standards of proof upon LP to obtain documents from the Department of Justice, the court of appeals has practically conferred upon the Department of Justice an immunity obviously not available to a defendant to protect its documents. This affects not only LP, but all other defendants which may be in the unfortunate position of being sued by the United States through the Department of Justice.

The Department is basically staffed by attorneys. If this case is an example, the Department will claim work product privilege as to most, if not all, of the documents

[19] *E.g.*, Swanner v. United States, 406 F.2d 716, 718 (5th Cir. 1969).

[20] The usual rule is that questions concerning the disclosure of government documents are within the discretion of the trial court and will not be reversed in absence of a clear abuse of discretion; *e.g.*, Fears v. Burris Mfg. Co., 436 F.2d 1357, 1362 (5th Cir. 1971).

generated internally, including market studies by Government economists. Thus, it can be expected that the work product doctrine and governmental privilege claims will be asserted as to most of the internal documents. Under the Sixth Circuit's decision, as to any single Government document developed by its attorneys or its economists under an attorney's direction, LP must make a showing and the District Court must make an "explicit finding," apparently document by document, that (a) the document is relevant,[21] (b) LP's objective need for the document overrides the Government's interest in secrecy, (c) the document is important to LP's defense and the information probably cannot be obtained elsewhere, (d) the document does not include mental impressions, opinions or legal theories of the attorney or any other legal representative, and (e) the document was not generated in anticipation of litigation.[22]

The Sixth Circuit's strict standards seem to preclude the use of generalized proof of relevancy and need. It will be remembered in this case that the elaborate showing of need made by LP was apparently thought to be insufficient by the Sixth Circuit since it was not made document by document. The problem is compounded, if not rendered impossible, by the fact that even the attorneys for the defendant are not allowed to see the documents. If the defendant is fortunate to convince the district court to inspect the documents, *in camera*, he must then convince the district court to make elaborate findings as to the

[21] As pointed out in note 17, *supra*, the Sixth Circuit's apparent standard is even more strict than the law heretofore has indicated.

[22] In this case, even though the Government made no showing that the documents were produced in anticipation of litigation and, for that matter, made no formal claim of privilege, the Sixth Circuit's decision assumes that all Government investigations are presumptively in anticipation of litigation. The decision appears to put an affirmative duty on LP to show that the documents were not made in anticipation of litigation.

foregoing. This places a tremendous burden on the court and will seriously hinder the use of *in camera* proceedings. It gives the Government sweeping authority to protect its files. It is submitted that the Sixth Circuit's Opinion indirectly does exactly what other courts have refused to do directly.[23] In *Abel Inv. Co.* v. *United States*,[24] the court stated as follows:

> To some extent the government seems to be taking the position that because continuity can be shown from audit to litigation, in that each report is submitted to the person who must make the next determination in a process which may lead to trial, any report or document prepared by any link in the chain is prepared in anticipation of litigation. If this court were to so hold, it would indeed put the government in a position markedly advantageous to that of a private litigant. I think that any government agency whose determinations might lead to litigation could show the same continuity, as all serve the same master; but to *hold that any intra-agency or inter-agency report which eventually could be relayed to the attorney who must try the case for the government is a report or document prepared in anticipation of litigation would be effectively to shield all government reports.* This is, I think, clearly contrary to the intent of Rule 26.

In addition to the foregoing, the decision of the Sixth Circuit conflicts directly with Fed.R.Civ.P. 52(a), which expressly provides that such findings are not necessary in this type of proceeding.[25]

For the foregoing reasons, the Sixth Circuit's reversal of matters which are clearly discretionary with the district

[23] *See*, Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133 (E.D. Wisc. 1972); Peterson v. United States, 52 F.R.D. 317 (S.D. Ill. 1971); United States v. San Antonio Portland Cement Co., 33 F.R.D. 513 (W.D. Tex. 1963).

[24] 53 F.R.D. 485, 490 (D. Neb. 1971) [emphasis added].

[25] *See also*, Ott v. Speedwriting Publishing Co., 518 F.2d 1143 (6th Cir. 1975).

court and the imposition of impossible burdens of proof on a party seeking discovery should be reversed.

4. The Sixth Circuit's Undue Extension of the Work Product Doctrine Conflicts with a Decision in Another Circuit and Gives the Government an Unfair Litigating Advantage.

There is a split of authority as to whether the work product doctrine applies only to documents generated in reference to the litigation in which they are to be produced or whether it also applies to documents generated in reference to "closely related" litigation.[26] While acknowledging this split, the Sixth Circuit has granted the Government new and far-reaching power to avoid discovery by extending the work product immunity far beyond any decision cited in its Opinion. The Fourth Circuit's *Duplan*[27] decision, upon which the Sixth Circuit so strongly relies, was expressly restricted to the

> narrow question whether *upon the termination of litigation* the work product documents prepared incident thereto lose the qualified immunity [of Fed.R. Civ.P. 26(b)(3)].[28]

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[26] *Compare* United States v. International Business Mach. Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974), 21 F.R.Serv.2d 1126 (S.D.N.Y. 1976); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 119 (M.D. Pa. 1970); Hanover Shoe, Inc. v. United Shoe Mach. Co., 207 F. Supp. 407, 409-10 (M.D. Pa. 1962); Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 16 F.R.D. 534, 537 (D. Del. 1954); and Thill Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133 (E.D. Wisc. 1972) *with* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973), 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); United States v. O.K. Tire & Rubber Co., 71 F.R.D. 465 (D. Idaho 1976); Burlington Industries, Inc. v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974); Midland Inv. Co. v. Van Alystyne, Noel & Co., 59 F.R.D. 134, 138 (S.D.N.Y. 1973); and Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 275 F. Supp. 146 (E.D. Pa. 1967).

[27] Duplan Corp. v. Moulinage et. Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973), 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

[28] *Id.*, 487 F2d at 481 [emphasis added].

Neither *Duplan* nor any other case upon which the court below relies deals with this question in relation to investigations that did not result in litigation.[29] The Sixth Circuit's new standard gives the Government a work product immunity as to investigations regardless of whether they result in litigation. As the instant case clearly demonstrates, the Justice Department will claim that documents relating to *all* of its investigations are immune from discovery because litigation was likely when they were undertaken. In fact, the Government's position at the district court was that a presumption existed to this effect. The resulting, one-sided discovery gives the Government an unfair advantage in litigation and is a far cry from the liberal discovery posture of the Federal Rules.

In addition, the Department of Justice has been very successful in profiting from this split of authority. At the same time it successfully persuaded the Sixth Circuit to extend the work product doctrine so as to protect Government documents in "other investigations" from discovery, it was equally successful in persuading the Second Circuit to permit it to discover a defendant's work product documents from other litigation. 30/ It should not be permitted to have it both ways.

For these reasons, the decision of the Sixth Circuit as to the scope of work product should be reviewed by this Court.

CONCLUSIONS

Litigation with the Government is difficult even under ordinary circumstances. In this case the Government has fought the production of clearly relevant documents at every turn for a period of three years. It has espoused in-

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[29] In NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), the Court seemed to recognize that documents from investigations wherein the Government determined no complaint should be filed were not covered by the work product doctrine.

[30] See notes, 10, 11, *supra*.

consistent opinions in different district courts and circuit courts in order to protect its documents, but gain those of others.

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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December —, 1976

APPENDIX

APPENDIX A

No. 75-1719

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

LEGGETT & PLATT, INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed September 29, 1976.

Before: EDWARDS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

PECK, Circuit Judge. On May 15, 1971, the government filed the instant civil antitrust action against defendant-appellee Leggett and Platt ("LP") to require LP to divest itself of the March 31, 1968, stock acquisition of Detroit-based Motor City Spring Company and the January 2, 1969, assets acquisition of Cincinnati-based J. R. Greeno Company. On January 3, 1975, LP filed amended requests for the government to produce certain documents, including documents relating to the government's investigations, no more than one culminating in litigation, of other inner-springs and box springs manufacturers' acquisitions of

other springs manufacturers.[1] Over government objections of relevancy, work product, and governmental privilege, the district court ordered the government to produce the requested documents, except work products of the government's investigation of LP and of "other open investigations." The court, in denying the government's motion for reconsideration, elucidated its reasoning.

> "A work product privilege has a terminal point. When a case has ended or when an investigation is closed a work product privilege terminates. . . ." 19 Fed. Rules Serv. 2d 1370, 1372, 1975 Trade Cas. § 60,220.

The court, in rejecting the governmental privilege claim, found no "clear" or "accepted" privilege applicable, then purported to apply a "traditional weighing and balancing of interests" test, apparently finding LP's interest in "information" it "deems essential" sufficient to overcome "the government's interest in preserving the privacy of its internal consultative and deliberate process, thereby encouraging 'open, frank discussion between subordinate and chief concerning administrative action.' " The government failed to comply with the production order, and the district court thereafter dismissed the government's complaint without prejudice.

On appeal of the dismissal, the government argues that the district court improperly ordered production of irrelevant and privileged documents, such error thereby invali-

[1] The discovery rules apply to the government, as a party, just as to any party, though certain privileges, such as governmental privilege, may be available only to the government. United States v. Procter & Gamble Co., 356 U.S. 677, 681, 78 S. Ct. 983, 986, ... L.Ed.2d ... (1958); Amchem Products, Inc. v. GAF Corp., 64 F.R.D. 550, 553 (N.D. Ga. 1974); Moore's Federal Practice § 26.61 [2] (1976); Wright & Miller, Federal Practice & Procedure § 2019 (1970).

dating the dismissal. Because the district court made no explicit determination of relevance and failed to properly apply the government privilege doctrine, and because we view the work product doctrine as protecting work products of closed investigations, we vacate the dismissal and remand to the district court for further proceedings.

The Federal Rules of Civil Procedure (FRCP) authorize "extremely broad," C. Wright, Law of Federal Courts § 81 at 355 (2d ed. 1970), discovery. Unless the requested documents are either irrelevant or privileged, FRCP 26(b)(1), LP was entitled to their production.

That the government failed to prosecute civil antitrust actions to divest other industry acquisitions is in and of itself irrelevant because LP's purported defense of "discriminatory enforcement" is, as a matter of law, no defense. The government "alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958). Accord, *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 87 S.Ct. 1622, 81 L.Ed.2d 747 (1967); *Kixmiller* v. *SEC*, 160 U.S. App. D.C. 375, 492 F.2d 641, 645 (1974); *United States* v. *Hunter*, 459 F.2d 205, 220-221 (4th Cir.), *cert. denied*, 408 U.S. 934 (1972); *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 2 (7th Cir. 1971); *Robins & Weill, Inc.* v. *United States*, 63 F.R.D. 73 (M.D.N.C. 1974). There is no allegation that the proceedings against LP stem from racial or religious animosity, see, e.g., *Oyler* v. *Boyles*, 368 U.S. 448, 454-456, 82 S.Ct. 501, 505-506, 7 L.Ed.2d 446 (1962); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 16 S.Ct. 1064, 30 L.Ed. 220 (1886); *United States* v. *Swanson*, 509 F.2d 1205,

1208-1209 (8th Cir. 1975), or from a desire to punish LP for exercising its constitutional rights, see, e.g., *United States* v. *Berrios*, 501 F.2d 1207 (2d Cir. 1974), *United States* v. *Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc).

Yet investigatory inquiries into other industry acquisitions are relevant, and thereby discoverable unless privileged, to the extent they contain factual materials, such as surveys and economic analyses of the industry, and the government analyses. The government's reply brief admits their relevancy.[2] Because the district court failed to explicitly determine the relevancy of the requested documents, the district court on remand should determine the relevancy in light of the above criteria.

For documents containing relevant material, the district court should then consider the applicability of government privilege and work product doctrine.

The district court properly applied a balancing test in determining whether LP could pierce the qualified governmental official information privilege[3] to obtain the investigatory files.[4] But the court erred in finding that LP's

[2] "The United States does not claim that any factual materials relating to the substance of this case are irrelevant. Items containing substantive information have been included in this appeal only if they are protected by the work product exemption or governmental privilege. . . ." Government Reply Brief 7.

[3] The government has asserted only its non-statutory official information privilege. There is no assertion of state secret, military, informers' or statutory privilege. See Note, Discovery of Government Documents and the Official Information Privilege, 76 Colum. L. Rev. 142 (1976). The government concedes that its privilege is qualified rather than absolute.

[4] Given that the privilege is designed to encourage candid suggestions, advice, recommendations, and opinions, the privilege protects only suggestions, advice, recommendations, and opinions, rather than factual and investigatory reports, data, and surveys in government files. Johnson v. United States, 76-2 U.S.T.C. ¶ 9.497 (N.D. Ind. 1976); Smith v. FTC, 403 F. Supp. 1000, 1015 (D. Del. 1975); In Re Midwest Milk Monopolization Litigation, 60 F.R.D. 12, 19 (W.D. Mo. 1973); Wood v. Breier, 54 F.R.D. 7, 12 (E.D. Wis. 1972); Note, Discovery of Government Documents and the Official Information Privilege, 76 Colum. L. Rev. 142, 160-162 (1976). See Ernest & Mary Hayward Weir Foundation v. United States, 508 F.2d 894, 895 n. 2 (2d Cir. 1974); Kinoy v. Mitchell, 67 F.R.D. 1, 11-12 (S.D.N.Y. 1975); Gaison v. Scott, 59 F.R.D. 347 (D. Hawaii 1973). But see Dos Santos v. O'Neill, 62 F.R.D. 448 (E.D. Pa. 1974); Simon-Eastern Co. v. United States, 55 F.R.D. 88 (N.D. Ga. 1972). The government's appellate brief implicitly acknowledges the inapplicability of governmental privilege to "purely factual material." Government Brief 13.

subjective need, its "deem[ing]" the documents "essential," overrode the government interest in secrecy. To override the government interest in secrecy the court must find that LP's objective, rather than its subjective, need for the documents overrides the governmental interest in secrecy. See, e.g., *Sun Oil Co.* v. *United States*, 514 F.2d 1020 (Ct. Cl. 1975); *EEOC* v. *St. Francis Community Hosp.*, 21 Fed. Rules Serv. 2d 975, 11 EPD ¶ 10,806 (D.S.C. 1976); *Kinoy* v. *Mitchell*, 67 F.R.D. 1, 11, 14 (S.D.N.Y. 1975); *SEC* v. *Bausch & Lomb, Inc.*, 19 Fed. Rules Serv. 2d 332, 334 (S.D.N.Y. 1974); *Center on Corporate Responsibility, Inc.* v. *Schultz*, 368 F. Supp. 862, 881 (D.D.C. 1973); Note, Discovery of Government Documents and Official Information Privilege, 76 Colum. L. Rev. 142, 144 (1976). Although a district court's balancing of the competing interests will be reversed only for an abuse of discretion, *Brown* v. *Thompson*, 430 F.2d 1214, 1215-1216 (5th Cir. 1970), the district court must use the proper interests in its balancing process.

In assessing LP's need, the district court should consider, *inter alia*, the importance of the documents to LP's defense, *SEC* v. *Nat'l Student Marketing Corp.*, 68 F.R.D. 157, 160-163 (D.D.C. 1975), *aff'd*, CCH Fed. Sec. ¶ 95, 612

(D.C. Cir. 1976), *Kinoy, supra*, 67 F.R.D. at 12, *Dos Santos* v. *O'Dell*, 62 F.R.D. 448 (E.D. Pa. 1974), *Amchem Products, Inc.* v. *GAF Corp.*, 64 F.R.D. 550, 553-554 (N.D. Ga. 1974), *Wood* v. *Breier*, 54 F.R.D. 7, 10 (E.D. Wis. 1972), and the availability elsewhere of the information contained in the documents, *Kinoy, supra, United States* v. *Illinois Fair Plan Ass'n*, 67 F.R.D. 659 (N.D. Ill. 1975), *Dos Santos, supra*, 62 F.R.D. 448, *Gaison* v. *Scott*, 59 F.R.D. 347 (D. Hawaii 1973), see *McKillop* v. *Regents of the University of California*, 386 F.Supp. 1270, 1277-1278 (N.D. Calif. 1975).

In assessing the government interest in secercy, the district court should remember that the requested files are of completed investigations.[5] Often courts have recognized that there is less government interest in secrecy in completed, than in ongoing, investigations. See e.g., *Breier, supra*, 54 F.R.D. at 10 n. 18.

The district court viewed the work product doctrine as being inapplicable to closed investigations.[6] Supporting the district court's determination are *United States* v. IBM, 66 F.R.D. 154, 178 (S.D.N.Y. 1974), ... F.R.D. ... (No. Civ. 69-200, S.D.N.Y., filed May 14, 1976), *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970), *Hanover Shoe, Inc.* v. *United Shoe Mach. Co.*, 207 F. Supp. 407, 409-410 (M.D.Pa. 1962), and *Tobacco & Allied Stocks, Inc.* v. *Transamerica Corp.*, 16 F.R.D. 534, 537 (D. Del. 1954). However, *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973),

[5] The district court found that the work product doctrine would bar discovery of "open" investigations, and LP has not appealed that determination.

[6] The work product doctrine clearly applies to the work produced by government attorneys in anticipation of litigation. See NLRB v. Sears, Roebuck & Co., ... U.S. ..., 95 S.Ct. 1504, 1518 ... L.Ed.2d ... (1975), and the cases cited therein.

509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975), *United States* v. *O.K. Tire & Rubber Co.*, 1976 Trade Cas. ¶ 60,984 n. 7 (D. Idaho 1976), *Burlington Industries, Inc.* v. *Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md. 1974), *Midland Inv. Co.* v. *Van Alystyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973), and *Philadelphia Elec. Co.* v. *Anaconda Am. Brass Co.*, 275 F.Supp. 146 (E.D. Pa. 1967), have found the work product doctrine applicable to bar discovery of work products in terminated litigation, at least of "closely related" litigation. *Anaconda Brass, supra*; *Midland Investment, supra*. The irreconcilably conflicting opinions have prompted courts and commentators to refer to the work product doctrine to work product generated in anticipation of other litigation as lacking "decisive resolution" (*Midland Investment, supra*, 59 F.R.D. at 138), "unresolved" (Note, Discovery of an Attorney's Work Product in Subsequent Litigation, 1974 Duke L.J. 799, 810), and "not altogether clear," (J. Moore, Federal Practice ¶ 26.64(2) (2d ed. 1975)). Wright and Miller, however, have referred to the application of the work product doctrine to documents prepared in anticipation of other litigation as "[t]he sounder view . . . , at least if the two cases are closely related." Wright & Miller, Federal Practice & Procedure, § 2024 at 200-201 (1970). *Duplan, supra*, similarly has been hailed as "maintaining the delicate balance between reasonable inquiry through discovery and the privacy and professional integrity of the adversary system." Comment, Civil Procedure—Discovery—Work-Product Privilege Extends to Subsequent Litigation, 27 Vand. L. Rev. 826, 833 (1974).

Given the absence of definitive language in FRCP 26(b)(3), see *Duplan, supra*, 487 F.2d at 482, and the conflicting decisions, our decision has been difficult. On balance, though, we view the work product doctrine as protecting

work produced in anticipation of other litigation. As *Duplan, supra*, 487 F.2d at 482-483, recognized, *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385.

> "clearly stands for the principle that the integrity of the adversary process must be safeguarded in spite of the desirability of the free interchange of information before trial. Its overriding concern is that the lawyer's morale be protected as he performs his professional functions in planning litigation and preparing his case. . . .
>
> "[T]he rationale is scarcely less applicable to a case which has been closed than to one which is still being contested. The decision was not in any manner based upon the rights or posture of the litigants vis-a-vis each other. . . .
>
> "[W]e find no indication that the Court [in *Hickman, supra*] intended to confine the protection of the work product to the litigation in which it was prepared or to make it freely discoverable in a subsequent law suit."

Were the work product doctrine an unpenetratable protection against discovery, we would be less willing to apply it to work produced in anticipation of other litigation. But the work product doctrine provides only a qualified protection against discovery, at least of products other than "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Duplan, supra*, 487 F.2d at 485; *Work-Product Privilege Extends to Subsequent, Unrelated Litigation, supra*, 27 Vand. L. Rev. at 833. Compare *Handgards, Inc.* v. *Johnson & Johnson*, 413 F. Supp. 927 (N.D. Calif. 1976), with *Duplan, supra*, 509 F.2d 730.

Our determination that the work product doctrine applies to work produced in anticipation of other litigation will require the district court, upon remand, to determine whether the documents the government claims are work products are, in fact, work products. See, e.g., *Burlington Industries, supra*, 65 F.R.D. at 42-43; *Garfinkle* v. *Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974). Even if the district court finds the documents are work products in anticipation of litigation, it may, of course, compel production of those documents, should LP have a "substantial need of the materials in the preparation of [its] case" and be "unable without undue hardship to obtain the substantial equivalent of the materials by other means," keeping in mind that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FRCP 26(b)(3). See e.g., *Burlington Industries, supra*, 65 F.R.D. at 33, 43; C. Wright, The Law of Federal Courts § 82 at 366-68 (2d ed. 1970).

On remand, the district court should determine the relevancy of the requested documents, and for documents containing relevant material determine the applicability of the government privilege and work product doctrines. In determining the applicability of government privilege, the district court should recognize that it shields only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data and surveys in governments files. The district court should similarly determine the applicability of the work product doctrine, which we have held applies to work produced in anticipation of other litigation, and whether LP has made a sufficient showing to overcome the work production doctrine.

Vacated and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 7976

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEGGETT & PLATT, INC.,

Defendant.

(Filed March 6, 1975)

OPINION AND ORDER

RUBIN, D. J.: This matter is before the Court pursuant to a motion of plaintiff to reconsider and amend the February 3, 1975 Order of the Court relating to defendant's amended requests to produce, and a motion of the defendant to dismiss this action for failure to comply with the Court's Order.

The parties have submitted memoranda, memoranda contra, affidavits, and exhibits in support of their respective positions.

The essential determination regarding the plaintiff's motion to reconsider will be a determination of the application of the governmental privilege doctrine. Determination of the defendant's motion to dismiss will involve a fact question as to whether the plaintiff has complied with this Court's Order. Rule 37(a)(2), and Rule 37(b)(2)(C), Fed. R. Civ P.

This action was instituted by the plaintiff on May 18, 1971 pursuant to Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736 (15 U. S. C. § 25),

as amended, commonly known as the Clayton Act. The defendant is found and transacts business within the Western Division of the Southern District of Ohio, and is engaged in interstate commerce. The plaintiff is the United States of America. The parties are thus properly before this Court, and this Court has jurisdiction over the proceedings herein.

The instant controversy concerns the issue of discovery. It began with the defendant's amended requests to produce documents. These requests were submitted to opposing counsel and to the Court on December 19, 1974, and were filed with the Court on January 3, 1975. At a conference in chambers held in Cincinnati on January 3, 1975 plaintiff was directed to submit documents with the Court for *in camera* inspection. Some 7,000 pages of documents were filed and inspected. On February 3, 1975 the Court determined that some documents were privileged and were returned to plaintiff to retain, while others were held nonprivilged and were ordered delivered to defense counsel within five days. All documents were returned to plaintiff at that time. Four days later, on February 7, 1975, plaintiff filed a motion to reconsider the Court's Order of February 3, 1975. Due to a settlement conference between plaintiff and defense counsel in Washington, D. C. on February 10, 1975 the Court agreed to delay action on its Order to produce. The February 10, 1975 discussion failed to yield a settlement of the case.

On February 11, 1975 defendant communicated with plaintiff and was informed that in response to a demand upon plaintiff for the documents ordered produced that the plaintiff would and did refuse such demand. Accordingly, as of February 11, 1975 this Court's Order had been violated. Further action was again delayed pending a settlement conference ordered by the Court between plaintiff and

defense counsel, with the Court, in Dayton, Ohio on February 21, 1975.

Prior to the February 3, 1975 Order plaintiff's claims of privilege were based primarily upon the work product doctrine and an asserted privilege of "confidential business information." The claims based upon those two privileges were disposed of by the February 3, 1975 Order. Plaintiff subsequently, in its motion to reconsider, raised for the first time a doctrine of "governmental privilege." This Opinion is addressed to the application of that doctrine.

We observe that the claims of privilege under both the work product doctrine and governmental privilege relate to the same documents. These are documents prepared for internal governmental functions. Both concepts are recognized by statute and case law. There is, however, one essential difference. A work product privilege has a terminal point. When a case has ended or when an investigation is closed a work product privilege terminates. On the other hand, the governmental privilege, where applicable, has no general termination point. For this reason the documents ordered released in paragraph Two of the February 3, 1975 Order would never be discoverable if they come within the governmental privilege doctrine.

Governmental privilege is generally divided into five areas best described in Wright and Miller, *Federal Pleading and Procedure* at Section 2019:

> The United States has, or has claimed, (1) a privilege not to disclose the identity of informers, (2) a privilege for military or state secrets, (3) a privilege for certain reports to the government that are made confidential by nature, (4) a general privilege under the "housekeeping" statute, and (5) a constitutional privilege to refuse to disclose whatever the executive chooses to keep secret.

I.

Identity of Informers, Military or State Secrets, Statutory Confidentiality

The first three areas of privilege delineated by Wright and Miller above are not raised by the plaintiff, or by the facts of the instant controversy. Accordingly they need not be given further consideration.

II.

General Privilege Under the "Housekeeping" Statute

This area of the privilege has been so clearly resolved that we need not spend much time here, other than to note that it is in this area of privilege that the United States Court of Appeals for the Sixth Circuit has most directly considered the governmental privilege doctrine.

In *Appeal of United States Securities and Exchange Commission*, 226 F. 2d 501 (6th Cir. 1955), the United States Court of Appeals for the Sixth Circuit was confronted with the situation of a government employee refusing to produce documents. The employee relied on a governmental privilege, and the District Judge held him in contempt and committed him to the custody of the United States Marshal. The Circuit Court reversed the District Court decision, and based its holding in favor of governmental privilege on two Supreme Court cases:

> The record establishes that the appellant general counsel acted in conformity with the foregoing rules of the Commission. In doing so, he was protected in his claim of privilege by the principles announced in the opinions of the Supreme Court in *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, 71 S. Ct. 416, 95 L. Ed. 417 and in *Boske* v. *Comingore*, 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846.

There can be no dispute as to the state of the law in 1955 when this decision was made. The state of the law has changed since then, and *Appeal of United States Securities and Exchange Commission* must be considered in terms of the statute as it exists today. In *Touhy* v. *Ragen, supra,* the Court upheld Department of Justice Order No. 3229 and did not require compliance with a subpoena *duces tecum.* In effect the Court recognized the governmental privilege. However, Department of Justice Order No. 3229 was issued under authority of 5 U. S. C. § 22,[1] which has been substantially amended. In *Boske* v. *Comingore, supra,* the Court likewise affirmed the existence of a governmental immunity by upholding a regulation adopted by the Secretary of the Treasury prohibiting production of certain information. However, this regulation and this decision were also grounded in R. S. 161 (5 U. S. C. § 22) which has been amended.

The statute referred to above is generally known as the "housekeeping" statute.[2] The law in the Sixth Circuit, as announced in *Appeal of United States Securities and Exchange Commission,* was consistent with the accepted interpretation of that statute prior to its amendment in 1958. In 1958 the statute was amended to add the final sentence; "This section does not authorize withholding information from the public or limiting availability of records to the

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[1] 5 U.S.C. § 22 is presently codified as 5 U.S.C. § 301, and was previously known as R.S. 161.

[2] The statute now reads as follows: § 301. Departmental regulations. The head of an Executive department of military department may prescribe regulations for the government of his department, the conduct of his employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

public." The effect of this amendment on the continued vitality of *Appeal of United States Securities and Exchange Commission,* and similar cases, is best summarized in *Cooney* v. *Sun Shipbuilding & Drydock Company,* 288 F. Supp. 708, 713 (E. D. Pa., 1968).

> In support of this position, the brief cites several cases in which courts are purported to have upheld the right of various government agencies to withhold the production of documents from their files on the basis of regulations similar to those of the Department of Labor's former regulations. [citing *Boske* v. *Comingore, Appeal of U. S. Securities and Exchange Commission,* and *Touhy* v. *Ragen* in a footnote] But I find most of the cases cited by the government to be of limited relevance to the issues here presented for several reasons.
>
> * * * * *
>
> Second, many of the cases on executive privilege were decided on the authority of the so-called "Housekeeping Statute," 5 U. S. C. § 301, as amended, 1966 (formerly 5 U. S. C. § 2). That statute authorizes the heads of agencies to prescribe regulations for the "custody, use and preservation of its records, papers and property." Of itself the statute does not authorize the withholding of departmental files. But for many years, government agencies, with the acquiescence of the courts, consistently cited the statute as the basis for regulations prohibiting subordinate officials from making records available to members of the public or for use in litigation except upon permission of the secretary or agency head. However, any former presumptions as to the authority of that statute to justify the withholding of records was effectively laid to rest by the 1958 amendment to that statute, which provided:
>
> > "This section does not authorize withholding information from the public or limiting the availability of records to the public."

> Those cases cited by the government which were decided after the enactment of that amendment and upheld government claims of privilege on the authority of that statute, so held by merely citing the earlier precedents without considering the effect of the amendment on the continuing vitality of these cases. Later cases have clearly established a trend by courts away from merely ratifying the policy reasons asserted by the governmental agencies to support a claim of privilege, and have demonstrated instead a greater willingness on their parts to attempt the sometimes difficult task of reconciling agency policies against disclosure with the legitimate demands of proper judicial administration, to the end that courts may have all available information for the determination of controversies, and the agencies not be frustrated in the effective performance of their delegated responsibilities.

While the head of a governmental agency may still regulate an employee's handling of information, such information must be produced when demand is made upon the head of the department. Section 301 regulates the internal affairs of a department, but no longer reduces the availability of information to the public.

Accordingly, the plaintiff cannot claim a privilege from production of the documents pursuant to this area of the governmental privilege doctrine.

III.

Constitutional Privilege

The parameters of the executive branch's constitutional privilege to withhold information are not at all clear. The state of the law as of a year ago was aptly described by Wright and Miller in the following passage:

> Finally there is the contention, with distinct constitutional overtones, that by virtue of the separation of powers in the federal government the executive has an absolute privilege to withhold from Congress of the courts any information that the executive branch

> deems confidential. This contention, which, so far as the courts are concerned, goes back as far as *Marbury* v. *Madison* and the trial of Aaron Burr, has never been resolved.

That such constitutional privilege is not absolute and unqualified has recently been determined in the case of *United States* v. *Nixon*, ... U.S. ..., 94 S. Ct. 3090, 41 L. Ed. 2d 1039, 1067 (1974). The Court stated, in 94 S. Ct., at 3106, that:

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances.

While this decision resolves for the first time that the governmental constitutional privilege is not absolute, it does not set standards by which one may determine the extent of the privilege as it presently stands, if it exists at all. We are thus left in the position of having no clear privilege prohibiting discovery in the present situation, and we must resort to the traditional weighing and balancing of interests.

IV.

Weighing and Balancing

The interests in conflict are quite clear. On the plaintiff's side is the government's interest in preserving the privacy of its internal consultative and deliberative processes, thereby encouraging "open, frank discussion between subordinate and chief concerning administrative action." [3] Of the utmost importance here is the desire for administrative personnel to reduce their mental processes to writing, for in so doing they can increase their department's information recall capacity, and can better preserve

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[3] *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1953), Mr. Justice Reed sitting by designation.

an accurate account of a situation for future personnel that may come into contact with a particular case or file. The awareness that a particular writing may be released to an adversary attorney at some point in the future may well inhibit the government employee from reducing his thoughts to writing.

On the defendant's side is the overall thrust and policy of the Federal Rules toward complete and exhaustive discovery, thereby insuring that the resolution of litigated issues is based on all of the relevant evidence. Part of the rationale here is that to deprive a litigant of information that he deems essential to his cause, when such information is in the possession of the adverse litigant, is to in effect deprive him of his day in court.

From the discussion of the area of governmental privilege it is clear that none of the accepted privileges are applicable here. The government-plaintiff must therefore be accorded the same privileges and obligations as any other litigant.[4] *United States* v. *Procter & Gamble Company* [1958 TRADE CASES ¶ 69,046], 356 U. S. 677, 681, 78 S. Ct. 983, 986, 2 L. Ed. 2d 1077 (1958); *Timken Roller Bearing Company* v. *United States*, 38 F. R. D. 57, 65 (N. D. Ohio, 1964). It is therefore the Holding of this Court that the claim seeking a governmental privilege raised in the plaintiff's motion for reconsideration is Denied, and said motion on that issue and all other issues raised therein must be, and hereby is, Denied.

While counsel for plaintiff had previously indicated that the United States would not comply with the Order of this Court, at the present time we determine only that plaintiff's

[4] Reference to the recently enacted Federal Rules of Evidence is grss, H. R. 5463, on January 2, 1975. Rule 501 provides a general rule of privilege applicable to "witness, person, government, State, or political subdivision thereof". The standard privileges are thus applicable to government and private citizen alike, absent special authorization.

motion for reconsideration should be, and is hereby, Denied. Defendant's motion to dismiss should be Granted, and unless the plaintiff complies with this Court's Order of February 3, 1975 within five days of the date of the instant Order, plaintiff's complaint will, in accordance with Rule 37(b)(2)(C), Fed. R. Civ. P., be Dismissed pursuant to the instant Order, without further Order of this Court.

It is so Ordered.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action File No. 7976

UNITED STATES OF AMERICA
v.
LEGGETT & PLATT, INC.

(Filed March 14, 1975)

JUDGMENT

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Complaint is dismissed, pursuant to Rule 37(b)(2)(c), Federal Rules of Civil Procedure, as outlined in the Court's Order, entered March 6, 1975.

Dated at Cincinnati, Ohio, this 14th day of March, 1975.

JOHN D. LYTER
Clerk of Court

/s/W. SCOTT BROWN
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 7976

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEGGETT & PLATT, INC.,

Defendant.

(Filed March 24, 1975)

ORDER

Pursuant to this Court's power under Rule 60(a), Fed. R. Civ. P., to correct oversights or omissions in judgments or orders, this Court does hereby issue the following Supplemental Order to its March 6, 1975 Order in this case.

The attention of the Court has been directed to the provisions of Rule 41(b), Fed. R. Civ. P., which might be interpreted to hold that such Order acted as an adjudication on the merits and a dismissal with prejudice. The March 6, 1975 Order was based upon Rule 37(b)(2)(C), Fed. R. Civ. P. The Court does now specifically ORDER that this case be dismissed without prejudice.

It is so ORDERED.

/s/ CARL B. RUBIN
CARL B. RUBIN
United States District Judge

APPENDIX D

RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE STATES IN RELEVANT PART:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

* * * * *

Appendix D

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

* * * * *

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE STATES IN RELEVANT PART AS FOLLOWS:

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

* * * * *

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

* * * * *

Appendix D

(b) Failure to Comply with Order.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * * *

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE STATES IN RELEVANT PART AS FOLLOWS:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX E

Excerpts from Affidavits Filed in the District Court

[Caption Omitted]

AFFIDAVIT OF ROBERT A. McNEW IN SUPPORT OF PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

(Filed December 16, 1974)

ROBERT A. MCNEW, first being duly sworn, deposes and says that:

* * * * *

On or about November 26, 1974, defendant's counsel was informed that no documents would be produced from Antitrust Division's files unrelated to the instant case.

* * * * *

[Caption Omitted]

AFFIDAVIT OF MURRAY S. MONROE

(Filed February 18, 1975)

State of Ohio
County of Hamilton } ss:

MURRAY S. MONROE, being first duly sworn, deposes and says that:

* * * * *

(a) In a separate conversation during the week of February 3, 1975, Mr. McNew advised him that there were roughly eight inches of documents which the Plaintiff refused to produce.

* * * * *

Appendix E

[Caption Omitted]

AFFIDAVIT OF MURRAY S. MONROE

(Filed May 14, 1975)

State of Ohio
County of Hamilton } ss:

MURRAY S. MONROE, being first duly sworn, deposes and says that:

* * * * *

(3) He understands from the Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Action for Failure to Comply with the Court's Order that these documents in number represent 20% of the documents ordered to be produced, which would be approximately 1,400 documents.

(4) On March 13, 1975, at approximately 4:00 P.M., he called John Weedon, Chief of the Cleveland Field Office of the United States Department of Justice. He asked Mr. Weedon as to whether the Government's position had changed as to the production of the documents. Mr. Weedon stated that it had not. During the course of the conversation Mr. Weedon stated that the Plaintiff would not make available to Defendant or counsel for Defendant the internal documents which it had previously refused to produce. As indicated above and in a previous affidavit, Affiant is advised and believed that there are approximately 1,400 documents which fall in this category and that they are approximately eight (8) inches in height.

* * * * *

APPENDIX F

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-3035

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

HON. DAVID N. EDELSTEIN, Chief Judge United States District Court for the Southern District of New York, and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE OF UNITED STATES OF AMERICA TO PETITION FOR EXTRAORDINARY WRIT

BRUCE B. WILSON
Acting Assistant Attorney General,

BARRY GROSSMAN,
ROBERT B. NICKOLSON,
JOHN J. POWERS, III,
JAMES F. PONSOLDT,
Attorneys, Department of Justice,
Washington, D.C. 20530.

Appendix F

* * * * *

Chief Judge Edelstein's opinion of June 27, 1974,[19] which was reaffirmed in his May 14, 1976 Order, recognized the split in authority on the legal issue and adopted as the better policy the view espoused in those cases which limited the availability of the work product exemption to the case for which the work product was prepared. While the United States has taken the position that it is better policy not to so limit the exemption,[20] a district court which, in the absence of clear controlling precedent in its circuit, relies upon one of several respectable lines of conflicting authority can not be said to have "abused" its discretion.

* * * * *

As Judge Carter noted in *Midland Investment Co.* v. *Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973), the fact of the matter is that Rule 26(b)(3) provides little, if any, insight into the question of whether work product may be exempted from discovery in litigation other than the one for which it was originally produced. Similarly, the Fourth Circuit has stated that "there is, of course, nothing in the Rule itself that suggests a specific answer to the question before us, nor is there any indication in the Advisory Committee Note to Rule 26(b)(3) that the Committee gave any particular thought to this problem." *Duplan I, supra* 487 F.2d at 482.[38] As a result, while petitioner may disagree with Chief Judge Edelstein's view

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[19] Pet. App., Exhibit E, 66 F.R.D. 154.

[20] In *United States* v. *Leggett & Platt, Inc.*, (No. 75-1719, 6th Cir.). The United States has taken the position that the exemption is not limited to the litigation for which the work product is produced. That case is presently before the Sixth Circuit after oral argument. A copy of the briefs filed by the United States in that case are attached as Resp. App., Exhibits G and H.

[38] See also, 8 Wright & Miller, *Federal Practice and Procedure*, § 2024, at p. 201.

of the law on policy grounds, it may not be stated that the Judge's decision is inconsistent with the language of Rule 26(b)(3) or the clear intent of its drafters.

* * * * *

Respectfully submitted,

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July 2, 1976